May 26, 2000

Is the Senate About to Surrender a Constitutional Prerogative?

BASSANIO. *And I beseech you, wrest once the law to your authority: to do a great right, do a little wrong.*

PORTIA. *It must not be; * * * 'Twill be recorded for a precedent, and many an error by the same example will rush into the state.*

The Merchant of Venice, IV, i, 218-226
quoted on the title page of
CANNON'S PROCEDURE IN THE HOUSE OF REPRESENTATIVES (1959)

The Senate's constitutional rights and prerogatives are being threatened and, perhaps, being quietly given away without the consent of most United States Senators, whether Republicans or Democrats. The threat is particularly insidious because it is coming from within the Senate itself.

The threat involves the House of Representatives, but only in a roundabout way. **The threat itself does *not* come from the Other Body (which has made no new demands on the Senate) but from Senators who, it appears, wish to concede the constitutional rights and prerogatives with respect to appropriations bills which the Senate has always claimed.** The threat may be particularly acute, though, because it involves a constitutional point of view that is universally accepted in the House but has been uniformly rejected in the Senate.

The question is, which body, the Senate or the House of Representatives (or both), may constitutionally originate an appropriations bill? The House of Representatives has one answer; the Senate has another. Some Senators seem to know only the House's answer.

The Constitution provides that "All bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills." U.S. Const., Art. I, sec. 7, cl. 1. Everyone in this town agrees that this provision gives the House of Representatives the exclusive prerogative to originate "revenue" bills.[1] **Unlike the House, however, the Senate does not believe that appropriations acts are "revenue" bills.**

The position of the House of Representatives is clear and consistent. A current handbook of House procedure explains the House's position as shown below, and a classic statement of the House's position is set out in the margin.[2]

> "Under the Constitution, it is exclusively the prerogative of the House to originate 'revenue' bills [quoting Article I, section 7, clause 1]. The House has traditionally taken the view that this prerogative encompassed the sole power to originate all general appropriations bills. (And on more than one occasion the House has returned to the Senate a Senate bill or joint resolution appropriating money on the ground that it invaded the prerogatives of the House.) . . ."[3]

The Senate of the United States *does not agree* with the House of Representatives. The Senate *does not agree* that the Constitution gives exclusive power to the House to originate general appropriations bills. This position, too, has been clear and consistent.

It seems that Senator Daschle disagrees with the Senate's clear and consistent position, but it would be a mistake if recent statements and positions of the Senate's Democratic Leader

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[1] This is not to say that no difficult questions arise, see, *e.g.*, *United States v. Munoz-Flores*, 495 U.S. 385 (1990) (Victims of Crime Act of 1984 requiring a monetary "special assessment" on persons convicted of crimes was not a "bill for raising revenue" within the meaning of the Constitution and therefore could not have been passed in contravention of the Origination Clause).

[2] "Under immemorial custom the general appropriations bills, providing for a number of subjects as distinguished from special bills appropriating for single, specific purposes, originate in the House of Representatives and there has been no deviation from that practice since the establishment of the Constitution." C. Cannon, CANNON'S PROCEDURE IN THE HOUSE OF REPRESENTATIVES 20 (1959) (citations omitted). See also, the remarks of Mr. Cannon on the House floor on Oct. 10, 1962, 108 Cong. Rec. 23014 ("The priority of the House in the initiation of appropriation bills is buttressed by the strongest and most impelling of all rules, the rule of immemorial usage.").

[3] W.H. Brown, HOUSE PRACTICE: A GUIDE TO THE RULES, PRECEDENTS AND PROCEDURES OF THE HOUSE §2 (1996) (citations omitted).

led to a change in the Senate's ancient position, and it would be disgraceful if this change were accomplished without the knowledge and consent of all 100 Senators.

The Democratic Leader's meaning is not altogether clear to us, so we will let him speak for himself. Last week on the Senate floor, he said, "I am going to demand that every single appropriations bill that comes to the Senate before it can be completed be passed in the House first because that is regular order."[4]

And this week, in a news conference, the following exchange occurred:

> Sen. DASCHLE: ". . . But you know what the rules are. The rules are, under the Constitution, the rules require the House to act first on appropriations. That's what the rule is.
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> Now, I am asked all the time, 'Well, why are you holding up the appropriations bill?' Well, if you really want to know the truth, it's the Constitution that's holding up the appropriations process. It says —"
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> QUESTION: "But it's not the Constitution. It's a long-standing tradition that the House interprets as tantamount to that. But you say it's in the Constitution; it's not in the Constitution."
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> Sen. DASCHLE: "Well, it is the interpretation of the constitutional requirement. I agree with you it's not written precisely in the Constitution, but it has been a long-standing interpretation of the constitutional requirements of both houses that the appropriations bills move first in the House. That has been the interpretation. So we're simply saying let's stand by that interpretation. . . ."[5]

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[4] 146 Cong. Rec. S 4069 (daily ed. May 17, 2000). The following day, he said, "I objected [to taking up an appropriations bill], as I noted I would do yesterday, to taking up a bill that has yet to be acted upon in the House. The regular order is the bill must be approved in the House prior to the time we finish our work on the legislation. . . ." 146 Cong. Rec. S 4171 (daily ed. May 18, 2000).

In both statements, Senator Daschle used the term "regular order". That term is a term of art in Senate procedure, see, F. Riddick & A. Frumin, RIDDICK'S SENATE PROCEDURE 903 (rev. ed. 1992) ("Regular Order, Demand for, Forces Return to Unfinished or Pending Business"), but we are assuming that Senator Daschle did not intend such meaning. If he did, then we are even more puzzled by his statements.

[5] Federal News Service, "Regular media availability with Senate Minority Leader Tom Daschle," Wednesday, May 24, 2000, 10:49 a.m. EDT (on-line at Lexis-Nexis.Com).

The Democratic Leader's remarks might have been unexceptional if they had been uttered by the Democratic leader of the House — but no Senator, whether within the leadership or without, should be surrendering the prerogatives of the Senate.

Senator Daschle's position is not the position of the United States Senate. In 1935, the president pro tempore of the Senate ruled that "there is no constitutional limitation upon the Senate to initiate an appropriation." See text and commentary at note 11, *infra*. Frankly, Senator Daschle's position is not even the position of the House of Representatives which, unlike the Senate Democratic Leader, makes its exclusive claim only for *general* appropriations bills and not (in Senator Daschle's words) "*every single* appropriations bill." Riddick's book of Senate procedure lists numerous examples of "specific appropriations" that have originated in the Senate.[6]

Nor does the House insist that it "move first" (which is Senator Daschle's phrase).[7] The House does insist that it *originate* general appropriations bills, but we are not aware that the House has ever claimed that it must "move first". Indeed, the history of appropriations acts shows that the House *can* "originate" *without* moving first (although usually the House has moved first). **If Senator Daschle is describing general historical practice, we have little argument with his point;[8] if he is stating a principle, he is mistaken.**

The Senate has always made a distinction between custom or tradition and the requirements of the Constitution. **Senator Daschle seems to ignore this distinction, but the United States Senate has never agreed with the position taken by the Democratic Leader.**

Some of the key documents in the Senate's history are reprinted below:

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[6] F. Riddick & A. Frumin, RIDDICK'S SENATE PROCEDURE 153 n. 4 (rev. ed. 1992). The examples run from volume 15 of Statutes at Large through volume 68 of Statutes at Large, showing that the practice is not a recent one. The text from RIDDICK, but not the footnote, is quoted at text at note 9, *infra*.

[7] In his press conference, Senator Daschle went on to say in the next sentence after the ones quoted above, "Now, we're not in some cases even suggesting that the bill has to be here, as we've demonstrated again with legislative appropriations. We'll consider some of these things." Federal News Service, *supra* n. 5. We are unable to tell how this position squares with the Senator's other position, given three sentences earlier, that the House must "move first".

[8] A useful history of the appropriations process may be found in S. Streeter, "The Appropriations Process: An Introduction," see especially p. 4, CRS Report for Congress, No. 97-684 GOV (updated April 11, 2000).

I. Senate Precedent from RIDDICK'S SENATE PROCEDURE

"The House of Representatives claims the exclusive right to originate all general appropriations bills. Through the years, however, bills for specific appropriations such as for disaster relief have frequently originated in the Senate.

"In 1935 the Chair ruled that there is no Constitutional limitation upon the Senate to initiate an appropriation bill.

"The Committee on the Judiciary of the House of Representatives in 1881 made a report to that body holding that the Senate had the Constitutional power to originate a certain appropriation bill, and that the power to originate an appropriation bill was not exclusively in the House of Representatives.

"Quoting in part from the report, the committee held: 'From this brief summary it will be seen that the proposition was more than once presented to the [constitutional] convention to vest in the House of Representatives the exclusive privilege of originating 'all money bills' *eo nomine*, which was as often rejected. It would seem obvious, therefore, that the framers of the Constitution did not intend that the expression "bills for raising revenue," as employed by them, should be taken as the equivalent of that term as it was understood in English parliamentary practice; for, if they had so intended, they would surely have used that term itself, which had already received a fixed and definite signification from long and familiar usage, instead of the one they chose to employ.' "[9]

II. Position of the Senate in 1962: Text of S. Res. 414 as it Passed the Senate

In 1962, the Senate and the House were locked in a contentious, and highly relevant, dispute about the powers of the two houses with respect to appropriations. The Senate passed S.J.Res. 234, a resolution making continuing appropriations for the Department of Agriculture for fiscal year 1963, and the House responded by passing a resolution saying the Senate had overstepped its bounds. In turn, the Senate passed the following resolution:

"Whereas the House of Representatives has adopted House Resolution 831 alleging that Senate Joint Resolution 234, a resolution continuing the appropriations for the Department of Agriculture, to be in contravention of the

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[9] F. Riddick & A. Frumin, RIDDICK'S SENATE PROCEDURE 153-54 (rev. ed. 1992) (footnotes, containing numerous citations, omitted).

first clause of the seventh section of the Constitution and an infringement of the privileges of the House; and

"Whereas this clause of the Constitution provides only that 'All bills for raising revenue shall originate in the House of Representatives,' and does not in anywise limit or restrict the privileges and power of the Senate with respect to any other legislation; and

"Whereas the acquiescence of the Senate in permitting the House to first consider appropriation bills cannot change the clear language of the Constitution nor affect the Senate's coequal power to originate any bill not expressly 'raising revenue'; and

"Whereas the Committee on the Judiciary of the House of Representatives, pursuant to a directive of the House of Representatives, reported to the House in 1885 that the power to originate bills appropriating money from the Treasury did not reside exclusively in the House: Therefore be it

"*Resolved,* That the Senate respectfully asserts its power to originate bills appropriating money for the support of the Government and declares its willingness to submit the issue either for declaratory judgement by an appropriate appellate court of the United States or to an appropriate commission of outstanding educators specializing in the study of the English language to be chosen in equal numbers by the President of the Senate and Speaker of the House; and be it further

"*Resolved,* That a copy of this resolution be transmitted to the House of Representatives."[10]

On the 1962 resolution, Senator Kenneth Keating (R-NY) asked Senator Richard Russell (D-GA) if he wanted a roll call vote on the resolution, and Senator Russell replied that he did not think one necessary because he was "sure the Senate is unanimously in support of this proposition." Senator Keating said he agreed with the Senator from Georgia, and the resolution was agreed to by voice vote.[11] As in typical Senate practice, it appears that the resolution passed by voice vote after the Democratic and the Republican floor managers both approved it.

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[10] 108 Cong. Rec. 23470 (Oct. 13, 1962).

[11] *Id.*

III. Ruling of the President Pro Tempore in 1935

In 1935, the following exchange occurred on the Senate floor:

"Mr. HARRISON. Mr. President, I make the point of order that the Senate cannot initiate an appropriation, and there is no authority in law.

"The PRESIDENT pro tempore. It is the opinion of the Chair that there is no constitutional limitation upon the Senate to initiate an appropriation. The point of order is overruled."[12]

That result remains a precedent of the Senate.

The ruling in 1935 may be somewhat unorthodox because "Under the uniform practices of the Senate, whenever a question of constitutionality is raised, the Chair submits the question to the Senate for decision. . . . [T]he Presiding Officer has no authority to pass upon a constitutional question, but must submit it to the Senate for its decision."[13] We do not know if the Senate had a different procedure 65 years ago, but we do note that all of the citations to precedents in Dr. Riddick's book postdate the 1935 ruling.

If a Senator wished to test the Democratic Leader's constitutional theory, he could, at the appropriate time, put a constitutional point of order to the Presiding Officer and have the question submitted to the Senate. We doubt that the Senate would surrender the position it has defended for decades.

IV. The Historical/Constitutional Background As Explained by CRS Legal Expert Johnny H. Killian

"[T]he constitutional provision on origination applies to '[a]ll bills for raising Revenue.' There are two different kinds of bills concerned here. Revenue bills are those the primary purpose of which is to raise revenue, *i.e.*, to impose taxes. *E.g.*, *United States v. Norton*, 91 U.S. 566, 567 (1875); *Twin City Bank v. Nebeker*, 167 U.S. 196 (1897). Revenue bills do not comprehend appropriations bills. We need not rely on the plain language of the clause here, because, unlike many other constitutional disputes wherein the intention of the Framers is ambiguous or must be discerned solely from the language used, the record in the

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[12] 79 Cong. Rec. 6860 (May 3, 1935).

[13] F. Riddick & A. Frumin, RIDDICK'S SENATE PROCEDURE 685 (rev. ed. 1992) (footnotes omitted).

Constitutional Convention shows the Framers consciously including tax bills and excluding appropriation bills.

"Progress of the origination clause was extensively considered in the Convention [footnote to McDonald & Mendle, "The Historical Roots of the Originating Clause of the U.S. Constitution: Article I, Section 7," 27 *Modern Age* 274 (1983)]. While the Virginia Plan, introduced on May 29 by Randolph, gave to each House the 'right of originating Acts,'" 1 M. Farrand, RECORDS OF THE FEDERAL CONVENTION OF 1787 (rev. ed. 1937), 21, a competing draft, introduced the same day by Charles Pinckney, first contained a provision giving to the House of Representatives the power to originate 'all money bills of every kind.' *Id.*, 23; text at 3 *id.*, 596. Although various proposals for an origination clause were subsequently defeated by the Convention, as part of the 'Great Compromise' by which the question of the nature of state representation in each House was resolved, there was included a provision that 'all Bills for raising or appropriating money . . . shall originate in the first branch of the Legislature.' 1 *id.*, 524. See *id.*, 543-547 (debate and adoption of clause). The clause as reported by the Committee on Detail was again debated on August 8 and this time stricken from the draft. 2 *id.*, 223-225. Additional efforts to include the same or similar language read: 'Each House shall possess the right of originating all bills, except bills for raising money for the purpose or revenue, or for appropriating the same... which shall originate in the House of Representatives.' *Id.*, 292. Although it was debated on several occasions, the proposed clause was postponed while other matters were resolved. Finally, the Committee of Eleven, which was charged with considering all matters that had been postponed or not acted on, reported on September 5 the immediate predecessor to the present clause. 'All bills for raising revenue shall originate in the House of Representatives.' *Id.*, 508-509. With a revision of the clause allowing the Senate to amend such bills, the clause was adopted in present form on September 8. *Id.*, 552.

"Thus, it is evident that the Convention intended the distinction drawn in the language of the clause, its applicability only to tax bills, especially in light of the consideration over the course of the Convention of language that specifically referred to appropriations bills separate from revenue bills. And, in fact, Mason and Gerry, both of whom had proposed broader clauses to include appropriations and who had refused to sign the constitution, included among their objections the limiting of the originating clause so that the Senate could originate appropriations bills. *Id.*, 638 (Mason), 3 *id.*, 265-266 (Gerry)."[14]

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[14] Memorandum to Hon. Daniel Evans From American Law Division (signed Johnny H. Killian, Senior Specialist), Congressional Research Service, Library of Congress, March 11, 1988, reprinted at 134 Cong. Rec. 21804-05 (Aug. 11, 1988).

Conclusion: This Senate Must Not Abandon its Predecessors

For generations, the Senate has protected its constitutional rights and prerogatives — and the House has done the same. Some Senators (on both sides of the aisle) are frustrated at the Senate's pace and procedure, but that is no reason to surrender the ground that was gained and held by those Americans who have had the privilege of sitting previously in the United States Senate.

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